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## Roman Roots for an Imperial Presidency: Revisiting Clinton Rossiter's 1948 Constitutional Dictatorship: Crisis Government in the Modern Democracies

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ROMAN ROOTS FOR AN IMPERIAL PRESIDENCY:  
REVISITING CLINTON ROSSITER'S 1948  
*CONSTITUTIONAL DICTATORSHIP: CRISIS*  
*GOVERNMENT IN THE MODERN DEMOCRACIES*

*David Rudenstine*<sup>†</sup>

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INTRODUCTION

Given that my current interest is in the emergence of presidential power in the United States since World War II, my effort to fit into a symposium on *Constitutionalism, Ancient and Modern*, especially when one commentator traces the modern period of constitutionalism to the twelfth century, does feel like trying to squeeze a square peg into a round hole. But my retrospective glance at a book published sixty-five years ago does provide one connection to the symposium's subject matter. That connection is Clinton Rossiter's contention in *Constitutional Dictators*<sup>1</sup> that the idea that a democratic state must have a mechanism to establish a powerful authoritarian rule—a dictatorship—during a time of crisis is rooted in the Roman Republic.

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<sup>1</sup> CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948) [hereinafter CD].

Thus, my paper for this conference constitutes a revisiting of Rossiter's 1948 study, and is entitled *Roman Roots for an Imperial Presidency*.

I. MY ROAD FROM *UNITED STATES V. REYNOLDS* TO ROSSITER'S  
*CONSTITUTIONAL DICTATORSHIP*

Since 9/11 there has been a renewed, intense, almost feverish scholarly interest in the powers of the president and the consequences of those enhanced powers for a democratic regime. Although this recent scrutiny builds on celebrated studies made during the Vietnam War era, such as *The Imperial Presidency* by Arthur M. Schlesinger, Jr.,<sup>2</sup> the contemporary level of scrutiny is broader and more intense than it was four decades ago.<sup>3</sup> That is due at least in part to the expansion of the national security state in recent decades, and that expansion has been accompanied by deepening concerns that the power of the presidency and the authority of the various departments or agencies within the executive branch are not meaningfully controlled by Congress or meaningfully held accountable by the courts. And this critique brings into focus the penultimate question as to whether the president and the executive branch, at least as its authority and activities relate to national security, function outside a system of constitutional checks and balances.<sup>4</sup> Or to put the matter bluntly, is the president largely above and beyond meaningful legal constraints when acting to protect or advance the national security?

For some time now I have been researching and writing about *United States v. Reynolds*,<sup>5</sup> decided by the Supreme Court in April 1953, sixty years ago. That case is not particularly well known today but yet it is enormously important. It is little known because the *Reynolds* case was not understood at the time to announce anything novel, even though it did, and because it did not set off conventional legal fire crackers such as a fiery and blistering dissent and substantial criticism in the press. However, *Reynolds* is important because it established the

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<sup>2</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

<sup>3</sup> The literature on this subject is vast, but for more information, see generally THE CONSTITUTION IN WARTIME (Mark Tushnet ed., 2005); PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* (2005); DANIEL PATRICK MOYNIHAN, *SECRECY* (2009); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); RICHARD A. POSNER, *NOT A SUICIDE PACT* (2006); DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* (2011); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007); and JON YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2009).

<sup>4</sup> A recent study on the subject summarizes the various scholarly positions on the subject. See POSNER & VERMEULE, *supra* note 3.

<sup>5</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

modern contours of the contemporary common law state secrets doctrine, a doctrine that protects the confidentiality of information that falls within the privilege, and a doctrine that is today both exceptionally significant and controversial.<sup>6</sup>

The *Reynolds* case is also important because it has become one of the pillars of what I term the Age of Deference, a period beginning with the end of World War II and running through today, during which the federal courts have developed, adopted and endorsed an attitude of “utmost deference”<sup>7</sup> towards the executive branch in cases the executive claims implicate national security. During this Age of Deference, federal courts have crafted and defined one legal doctrine after another, which, taken together, have more or less built a bubble over the executive branch in cases implicating national security, thus generally insulating the executive from meaningful judicial accountability.<sup>8</sup> The

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<sup>6</sup> The Supreme Court’s decision in *Reynolds* announced for the first time in the history of the United States a set of rules that federal courts must follow in adjudicating cases in which the executive branch claims the state secrets privilege. Those rules continue to this day to form the cornerstone of the contemporary and controversial state secrets privilege. Thus, the court stated that the privilege may be asserted only by the government and that it should not be “lightly invoked.” *Id.* at 7. Moreover, the privilege may only be asserted “by the head of the department which has control over the matter,” and then, only after the department head has had “actual personal consideration” of the matter. *Id.* at 8. The court stressed that a “court itself must determine whether the circumstances are appropriate for the claim of privilege,” and that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Id.* at 8, 10. The Supreme Court also stated that a court must try to decide whether the privilege should be sustained “without forcing a disclosure of the very thing the privilege is designed to protect.” *Id.* at 8. To accomplish the twin goals of the court assuring that it does not abdicate control over the evidence to the “caprice of executive officers,” while not requiring the disclosure of the sensitive information, the Court stated the following guideline:

It may be possible to satisfy the court, from all of the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

*Id.* at 9–10. Lastly, the court concluded that once a judge was convinced that “military secrets are at stake,” the privilege must be sustained no matter how necessary and vital the information may be to the party seeking access to it or how directly relevant the information may be to matters of public importance and how useful it may be to the public. *Id.* at 11. Pursuant to the *Reynolds* rules, the Court granted the executive a de facto absolute privilege, and during the last three and one-half decades, federal courts have given the state secrets privilege rules a sweeping application that has thrust the privilege and the courts into a national controversy.

<sup>7</sup> *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>8</sup> *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (articulating a new and more demanding pleading standard for evaluating the sufficiency of a complaint: the first step requires the exclusion of conclusory allegations, and the second step requires an assessment of whether a plausible fit exists between the non-conclusory facts alleged and the judicial relief claimed); *Tenet v. Doe*, 544 U.S. 1, 3 (2005) (expanding the rule articulated in *Totten v. United States*, 92 U.S. 105 (1876), “prohibiting suits against the Government based on covert espionage agreements”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (imposing more demanding standing requirements); *INS v. Chadha*, 462 U.S. 919 (1983) (delimiting Congress’s role in

consequences of that insulation is the denial of judicial relief to individuals arguably denied a legal right by executive officers or those private parties acting in concert with them, the undermining of checks and balances in our governing scheme, the lack of accountability for unlawful or illegal conduct committed by members of the executive branch, and the betrayal by the courts of their ultimate responsibility to uphold the rule of law.

Because I understand *Reynolds*, as well as other Supreme Court decisions decided during the same period, as expressions of a frame of mind squarely rooted in the international crisis at the time and in the emergence of the presidency as the overwhelming dominant power in the United States, my pursuit to enhance my understanding of that era led me to Clinton Rossiter's book.

## II. CLINTON ROSSITER'S *CONSTITUTIONAL DICTATORSHIP*

Clinton Rossiter was a student of the nationally prominent presidential scholar Edward S. Corwin (indeed he dedicated *Constitutional Dictatorship* to Edward S. Corwin and Robert E. Cushman), who was "the leading scholar of his era on the Constitution and the presidency."<sup>9</sup> Rossiter's early works<sup>10</sup> were deeply influenced by Corwin's scholarly values and approach which emphasized legal and historical considerations. Indeed, one of the reviewers of Rossiter's *Constitutional Dictatorship*, which was Rossiter's first book, specifically noted that Rossiter "thinks in formal and juristic rather than in concrete and historical political terms,"<sup>11</sup> a criticism that seems aimed not only at Rossiter but also at Corwin. Between the publication of *Constitutional Dictatorship* and 1970, when Rossiter took his own life, Rossiter became a nationally prominent scholar, author, teacher and lecturer. However, as illustrious as he was, Rossiter may never have been in step with the

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agency oversight by declaring the one-house legislative veto unconstitutional); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (declaring that the president is absolutely immune from civil damages liability for his official acts); *Goldwater v. Carter*, 444 U.S. 996 (1979) (Rehnquist, J., plurality opinion) (dismissing the action on the ground that the case presented a non-justiciable political question); *United States v. Nixon*, 418 U.S. at 683 (granting the president a constitutionally based executive privilege); *Reynolds*, 345 U.S. at 1 (announcing new rules to guide the application of the state secrets privilege); *Mohamed v. Jeppesen Dataplan, Inc.* 614 F.3d 1070 (9th Cir. 2010) (applying the state secrets privilege before a responsive pleading is filed on the ground that the litigation presents an unacceptable risk that a state secret may be inadvertently made public); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (dismissing the action on the ground that no *Bivens* claim for relief is available on the facts of the case absent congressional authorization).

<sup>9</sup> CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* xii (1987).

<sup>10</sup> See CD, *supra* note 1; CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (expanded ed. 1976).

<sup>11</sup> William Ebenstein, Book Review, 54 AM. HIST. REV. 562, 564 (1949).

main currents of his scholarly discipline. Thus, by the time that *Constitutional Dictatorship* was published, the era of political science exemplified by Edward S. Corwin had crested, and by the time Rossiter had moved past his renowned teacher and wrote his celebrated *The American Presidency*, published in 1956, “adherents of the behavioral persuasion in political science were at or near their peak or evangelical fervor.”<sup>12</sup> The prominent political scientist Theodore Lowi characterized the ironies of Rossiter’s relationship with the fashions of his discipline by stating that Rossiter’s scholarship was in one sense “about twenty years too late,” and in another sense “about ten years too early.”<sup>13</sup>

Rossiter wrote *Constitutional Dictatorship* during tormented times. World War II inaugurated the atomic age. The United States had the bomb and within a few years the Soviet Union had it, too. In addition, World War II had shattered “the international system beyond recognition. Across Europe, Asia, the Middle East, and North Africa, the greatest conflict ever waged left a broad swath of destruction and human misery.”<sup>14</sup> Moreover, the West soon adopted Winston Churchill’s 1946 language as axiomatic that “an Iron Curtain has descended across”<sup>15</sup> the European continent, and the following year the United States embraced George F. Kennan’s advice set forth in his Foreign Affairs article that he signed as “X,” that the West shape and implement a policy of containment to blunt Soviet expansion and aggressiveness.<sup>16</sup> It was in this context that the United States experienced what is generally thought of as the dawn of the national security state. The National Security Act of July 1947—the “Magna Carta of the national security state”<sup>17</sup>—was adopted and created a cabinet level, civilian secretary of defense to preside over separate departments of the army, navy and air force; it institutionalized the wartime Joint Chiefs of Staff; it established the National Security Council in the White House; and it established the Central Intelligence Agency to replace the defunct Office of Strategic Services.<sup>18</sup> During the same timeframe, a war engulfed China, and soon thereafter the United States was engaged in a land war in Korea. On the domestic front, Senator Joseph McCarthy inaugurated a repressive period that bears his name with a speech in Wheeling, West Virginia on February 9, 1950, in which he stated, according to Richard H. Rovere,

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<sup>12</sup> ROSSITER, *supra* note 9, at xiv.

<sup>13</sup> *Id.* at xxvii.

<sup>14</sup> GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: UNITED STATES FOREIGN RELATIONS SINCE 1776*, at 595 (2008).

<sup>15</sup> *Id.* at 605.

<sup>16</sup> George Kennan, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).

<sup>17</sup> HERRING, *supra* note 14, at 614.

<sup>18</sup> *Id.*

that the "Department of State was full of Communists and that he and the Secretary of State knew their names."<sup>19</sup>

So it was in this period of intense domestic and international turmoil that Rossiter wrote *Constitutional Dictatorship* and Princeton University Press published it. Rossiter seems to have been motivated to write his book because he believed that the atomic age made it a necessity for the national government to have new and enhanced powers going forward. From his perspective, "the Bomb has settled once and for all the question whether the United States can go back to being what Harold Laski has labeled (a little too contemptuously) a 'negative state.'"<sup>20</sup> Rossiter insisted that you "can't go home again; the positive state is here to stay, and from now on the accent will be on power, not limitations."<sup>21</sup>

Indeed, Rossiter went further. "From this day forward," Rossiter declared, "we must cease wasting our energies in discussing whether the government of the United States is to be powerful or not." The United States "is going to be powerful," Rossiter announced, or it will be "obliterated."<sup>22</sup> "Our problem," Rossiter stated, "is to make that power effective and responsible, to make any future dictatorship a constitutional one."<sup>23</sup> Furthermore, according to Rossiter, "it is not too much to say that the destiny of this nation in the Atomic Age will rest in the capacity of the Presidency as an institution of constitutional dictatorship."<sup>24</sup> In other words, for Rossiter, in the wake of World War II, the confrontation with the Soviet Union along with the development of nuclear weapons, meant that "the age-old phenomenon of constitutional dictatorship has reached the peak of its significance,"<sup>25</sup> and the consequence of these dynamics is the grant of exceptional power to the chief executive. Or as Rossiter asserted, "[c]risis government is primarily and often exclusively the business of presidents and prime ministers,"<sup>26</sup> and to secure the nation's security in the future, Rossiter maintained that "[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself."<sup>27</sup> This was Rossiter's frame of mind as he prepared his comparative study of different nation states during times of crisis.

Rossiter begins his study, which may have been a revision of his dissertation, with two questions: "Is there in all republics this inherent

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<sup>19</sup> RICHARD H. ROVERE, SENATOR JOE MCCARTHY 6 (1959).

<sup>20</sup> CD, *supra* note 1, at 314.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 287.

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Id.* at 12.

<sup>27</sup> *Id.* at 314.

and fatal weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"<sup>28</sup> Rossiter immediately illustrates the dilemma by referencing President Lincoln's famous message to Congress dated July 4, 1861, in which he, after he had authorized military commanders to suspend the writ of habeas corpus between Philadelphia and Washington, asked rhetorically: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>29</sup> Rossiter then ends his first paragraph by imagining what Lincoln would say if he had been living in 1942: "Can a democracy fight a successful total war and still be a democracy when the war is over?"<sup>30</sup>

In answering his question and Lincoln's question, Rossiter again relies upon Lincoln's conduct to provide not only Lincoln's response but also Rossiter's own response to the questions. Lincoln "answered it himself," Rossiter wrote, "with a series of unusual actions whereby he had personally initiated a military, administrative, and legislative program to suppress the rebellion of the southern states and preserve the American Union," and by so doing, Lincoln made it clear "that in all republics there is *not* this inherent and fatal weakness, that a democratic, constitutional government beset by a severe national emergency can be strong enough to maintain its own existence without at the same time being so strong as to subvert the liberties of the people it has been instituted to defend."<sup>31</sup> And in case there be any doubt as to Rossiter's views about the theoretical prospects of modern democracies in the wake of "total war," Rossiter wrote that the "incontestable facts of history" affirmatively establish that a democracy can fight a total war and still be a democracy "when the war is over."<sup>32</sup>

Rossiter's thesis is quickly summarized. In times of crisis a free and democratic state must have some mechanism by which its "leaders could take dictatorial action in its defense."<sup>33</sup> If such a state lacked such capacity, or if its leaders lacked the will to use such power, the state "did not survive its first real crisis."<sup>34</sup> In fact [n]o democracy "ever went through a period of thoroughgoing constitutional dictatorship without some permanent and often unfavorable alteration in its governmental scheme."<sup>35</sup> The period of dictatorship is dangerous and must be controlled by the people. If it is not controlled the democratic state will

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<sup>28</sup> *Id.* at 3.

<sup>29</sup> ABRAHAM LINCOLN, *Message to Congress in Special Session, July 4, 1861*, in LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 253 (Don E. Fehrenbacher ed., 1989).

<sup>30</sup> *CD*, *supra* note 1, at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



disappear. If it is controlled too tightly the democratic state may succumb to the threat and thus disappear. The challenge is to thread the eye of this narrow needle to ensure that the democratic state survives the crisis without sacrificing its democracy.

Rossiter argues that the demands of dictatorship find its “rationale” in three basic facts. One, the complex system of an ordinary democratic government is “*essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis.*”<sup>36</sup> Two, during a national crisis, which Rossiter defines as during a time of war, rebellion or economic depression, the government will become stronger to overcome the peril and the people will have fewer rights.<sup>37</sup> Three, the empowered crisis government, “which in some instances might become an outright dictatorship,”<sup>38</sup> must have “no other purposes than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.”<sup>39</sup> Rossiter states without reservation or hesitancy that the dictatorial regime may “act arbitrarily and even dictatorially in the swift adoption of measures designed to save the state and its people from the destructive effects of the particular crisis.”<sup>40</sup>

In some respects the heart of Rossiter’s prescription for assuring that the paradox of a democratic state—to safeguard the liberties of its people while safeguarding itself—are set forth in eleven principles. These eleven guideposts<sup>41</sup> can be boiled down to the following claims: limit the assumption of dictatorial power to situations where such power is “necessary or even indispensable”; the would-be possessor of such power should not possess the authority to trigger the grant of such power; the grant of such power must be accompanied by a mechanism for terminating it; the power granted should be commensurate with the crisis and exercised in particular situations only to the extent required; the grant of such power should not extend beyond the crisis; and the termination of such power must be followed by as complete a return to pre-existing status as possible.

Rossiter imaginatively and impressively offers four case studies to illustrate and support his thesis: the Roman Dictatorship; the German Republic of 1919 to 1933; the 1878 State of Siege law and the history of France from then to World War II; crisis government in Great Britain from 1914 to 1939; and lastly crisis government in the United States

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<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 298–306.

from before the Civil War to World War II. Of the four case studies, the one focusing on the Roman Republic is by far the shortest and seems almost out of place by comparison to the other studies, a fact to which Rossiter is sensitive. This is evidenced by his (more or less) request that the reader be tolerant of its inclusion, which Rossiter attributes to his “classical education.”<sup>42</sup> Nonetheless, the inclusion of the Roman procedures does serve to illustrate Rossiter’s substantive claim that democratic societies have relied upon exceptional, dictatorial powers to defend themselves during times of crisis since ancient times.

### III. ROSSITER ON ROME AND THE UNITED STATES

Rossiter’s opening sentence in his chapter on the Roman dictatorship ties his general thesis to Rome: “The assertion that constitutional dictatorship has always been an indispensable accessory to constitutional government finds convincing demonstration in the heroic history of republican Rome.”<sup>43</sup> For Rossiter, the “Roman people grasped and solved the difficult problem of emergency powers . . . so uniquely and boldly that a study of modern” government during a time of crisis will “find no more propitious a starting point than a brief” review of the Roman Republic.<sup>44</sup> And the Romans, alone among the “nations of antiquity,” made a constitutional dictatorship, which Rossiter concedes “never” functioned as “a perfect ideal”<sup>45</sup> or “a regular instrument of government.”<sup>46</sup> Although Rossiter doubted the relevance of Roman political institutions to the modern age, he thought that the Roman dictatorship “is invaluable”<sup>47</sup> as a “theoretical standard, as a sort of moral yardstick against which to measure modern institutions of constitutional dictatorship.”<sup>48</sup> Rossiter describes the dictatorship provisions in Rome:

whereby in time of crisis an eminent citizen was called upon by the ordinary officials of a constitutional republic, and was temporarily granted absolute power over its whole life, not to subvert but to defend the republic, its constitution, and its independence. Most significant of all, provision for this emergency institution was made in the fundamental laws of the state.<sup>49</sup>

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<sup>42</sup> *Id.* at vii.

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 16.

When Rossiter turns his attention to the United States, he immediately concedes as he introduces his discussion of the United States that it is “stretching the point considerably to say that any American government has ever been a constitutional dictatorship.”<sup>50</sup> Indeed, he writes that “the application of this book’s title to American experiences with crisis government is little more than a convenient hyperbole.”<sup>51</sup> In fact, Rossiter comes very close to conceding that when the United States’ experience during the Civil War, World War I and II and the Depression of 1933 is compared to the “emergency regimes in France, England, and Weimar Germany,” it would appear that the government of the United States during these crises “acted in remarkably close conformance to the normal constitutional scheme,”<sup>52</sup> and that crisis government has “been a matter of personalities rather than of institutions,” with the “one consistent instrument of emergency government” being the “Presidency itself.”<sup>53</sup> One result of this history is “[s]trong government and abnormal government alike are anathema to the traditional American philosophy of politics.”<sup>54</sup> Moreover, while the “Constitution is no insurmountable barrier to the law of national self-preservation,”<sup>55</sup> it will “put a curb on the probability of constitutional dictatorship not paralleled in the governmental system of any other country,” and as a result, “constitutional dictatorship is still less of a possibility in the United States than in almost any other country on earth.”<sup>56</sup>

Rossiter’s discussion of martial law in the United States illustrates his view that neither the courts nor the legislature could ultimately contain the exercise of presidential power in times of crisis. Thus, in discussing the imposition of martial law during a time of domestic crisis, Rossiter noted that although state governments have been the primary implementers of martial law, the federal government has the authority to declare a state of martial law. “From the Whiskey Rebellion of 1794 . . . to the government’s seizure of several strike-bound industries in 1946 this power has never been doubted, and it has always been for the President alone to decide when and how and to what extent it is to be employed.”<sup>57</sup> More tellingly, perhaps, given Rossiter’s overall disposition to expect the president to be the ultimate guardian of order and security, Rossiter argues that “only effective restrictions” on presidential use of armed forces to keep the peace are the president’s

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<sup>50</sup> *Id.* at 209.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 210.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 212.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 216.

“own political and moral sense and the remote possibility of impeachment.”<sup>58</sup>

Rossiter’s comments on President Franklin D. Roosevelt and his famous one hundred days are also revealing of his precepts and his ambivalences. Thus, Rossiter asks in discussing 1933:

[W]hat were the elements which made the government of the United States in 1933 a positive crisis government? The answer is: the personality of Franklin D. Roosevelt and five recognized crisis techniques—executive initiative, executive leadership of legislation, an abbreviated legislative process, the delegation of powers by statute, and an expansion of the administrative branch. In brief, the crisis government of 1933 was marked by an unprecedented breakdown of the constitutional barriers separating Congress and the President.<sup>59</sup>

And then a few pages later, Rossiter goes further and claims that, with regard to the First One Hundred Days, never before in this history of the United States had “the gap” between the President and the Congress “been so completely and effectively bridged.”<sup>60</sup> At the same time, Rossiter softens his position a few pages later and writes that whatever may be said of FDR in the “White House or in Yalta, he was no dictator on Capitol Hill.”<sup>61</sup>

In sum, Rossiter perceives the power of the presidency as a “boundless grant of executive authority found in the Constitution, supplemented by broad delegations of discretionary competence from the national legislature.”<sup>62</sup> In Rossiter’s mind the “limitations [on the exercise of presidential power] are the political sense of the incumbent and the patience of the American people; its effectiveness rests in the personality and energy of the President himself and the circumstances with which he has to deal.”<sup>63</sup> And then, as if minimizing or dismissing the checks and balances in the governmental scheme exercised by Congress and the courts,<sup>64</sup> Rossiter asserts that “the Presidency does

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 256.

<sup>60</sup> *Id.* at 260.

<sup>61</sup> *Id.* at 271.

<sup>62</sup> *Id.* at 286.

<sup>63</sup> *Id.*

<sup>64</sup> With regard to Rossiter’s evaluation of the capacity of the courts to contain executive power, see ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF*, *supra* note 10, at 129. Rossiter noted:

[T]he Court has had little success in preventing the precedents of war from becoming precedents of peace. We might even go so far as to say that the Court has made a positive contribution to the permanent peacetime weakening of the separation of powers, the principle of non-delegation, the Fifth Amendment, and the necessary and proper clause as applicable limits to governmental power.

*Id.* By insisting that the two Constitutions, one for peace and the other for war, “were really

present a serious potential danger to the American people. It is for them to be eternally vigilant, to demand that this vast display of power be wielded in their behalf, as hitherto it always has been, and not against them.”<sup>65</sup>

#### IV. REVIEWS OF ROSSITER'S BOOK

In general Rossiter's book was positively reviewed at the time. One reviewer termed Rossiter's study a "valuable contribution";<sup>66</sup> another termed it "a real service by suggesting several significant reforms in our governmental system intended to make it less difficult to impose enforceable limitations upon the use of emergency power";<sup>67</sup> a third stated that Rossiter's study was "an important book . . . because of its subject matter and its clarity of style[,] organization and execution";<sup>68</sup> still another characterized the study as a "judicious discussion of an important subject";<sup>69</sup> a fifth reviewer stated the study was a "carefully documented analysis of the theory and practice of crisis government in Western democracies";<sup>70</sup> and another concluded that Rossiter's study was a "useful starting point for trenchant inquiries" into the "devices which constitutional governments have utilized to preserve themselves in the recurrent crises of the twentieth century."<sup>71</sup> Nonetheless, there were dissenting views. One reviewer concluded that Rossiter's study "must be considered a failure as far as the appraisal of the basic problems is concerned."<sup>72</sup> Another stated that the "most regrettable thing about the book is that so much good work should have been marred by errors of form and conception."<sup>73</sup> And still another stated: "The failure of the author's attempt to group all uses of emergency powers together under a single heading—and that the rather misleading one of 'constitutional dictatorship'—is indicated by the platitudinous nature of the conclusions he is driven to in his last chapter. This is a

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only one, the Court has contributed heavily to that emphasis on the Constitution as grant of power that dominates present [1950] constitutional law." *Id.* at 129–130 (alteration in original).

<sup>65</sup> CD, *supra* note 1, at 287; *see also* ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF*, *supra* note 10, at 131 ("Most important, the defense of the Constitution rests at bottom exactly where the defense of the nation rests: in the good sense and good will of the political branches of the national government, which for most martial purposes must mean the President and his military commanders.").

<sup>66</sup> Karl Loewenstein, Book Review, 42 AM. POL. SCI. REV. 1006, 1006 (1948).

<sup>67</sup> Virginia Wood, Book Review, 11 J. POL. 261, 263 (1949).

<sup>68</sup> Charles H. Shull, Book Review, 260 ANNALS AM. ACAD. POL. & SOC. SCI. 198, 199 (1948).

<sup>69</sup> Carl Brent Swisher, Book Review, 12 MILITARY AFF. 243, 244 (1948).

<sup>70</sup> Daniel M. Ogden, Jr., Book Review, 2 W. POL. Q. 665, 665 (1949).

<sup>71</sup> M. DeW. H., Book Note, 62 HARV. L. REV. 351, 352 (1948).

<sup>72</sup> Ebenstein, *supra* note 11, at 563.

<sup>73</sup> Herman Finer, Book Review, 49 COLUM. L. REV. 724, 728 (1949).

pity, because the separate studies which form the main body of the book are thorough, scholarly, and in themselves very useful.”<sup>74</sup>

Many of the reviewers quite properly took Rossiter to task for the use of the term “constitutional dictatorship.” As one wrote, although Rossiter used the term “constitutional dictatorship” in the title and repeatedly in the text, he, “for his own protection . . . finds it necessary to explain away most of the content” in that “[h]e characterizes the phrase as ‘hyperbole,’” or as “a rag-bag phrase.”<sup>75</sup> Another review persuasively commented that Rossiter’s own description of Lincoln and Franklin D. Roosevelt’s presidencies were, as noted above, inconsistent with the fundamental idea of a constitutional dictatorship. Thus, Karl Loewenstein claimed that since “Lincoln’s actions were supported by Congressional approval and ratification”<sup>76</sup> and Roosevelt’s actions “were either subsequently ratified or authorized in advance by Congress, with full support of public opinion,”<sup>77</sup> Rossiter “is disregarding his own [historical] material to suit his semantic premises . . . .”<sup>78</sup> Loewenstein further explained that Rossiter’s error is more than a nomenclature error since his conflagration of a strong executive with a constitutional dictatorship renders the term “‘constitutional’ dictatorship . . . rather meaningless”<sup>79</sup> and in the end detracts from a more thoughtful and fruitful analysis of the implications for democratic processes and values of a strong executive.

With few exceptions,<sup>80</sup> and this is true whether the review was complimentary or critical, the reviewers actually missed Rossiter’s essential perception regarding the United States, a perception not evident in his historical analysis of the United States—or Germany, France, Great Britain or Rome for that matter—but evident in his chapters before and after the historical analysis. In short, Rossiter thought that the emergence of the Atomic Age meant that going forward the United States must always remain a powerful military power, that there would be no significant difference between a time of peace and a time of war, and that the defense and survival of the United

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<sup>74</sup> Alfred Cobban, Book Review, 25 INT’L AFF. 195, 196 (1949).

<sup>75</sup> Swisher, *supra* note 69, at 244.

<sup>76</sup> Lowenstein, *supra* note 66, at 1008.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> One reviewer did understand the value of Rossiter’s glimpse of the future and characterized Rossiter’s view as follows: “He predicts that with the future will come more rather than less frequent use of emergency power and that ‘the destiny of this nation in the Atomic Age will rest in the capacity of the Presidency as an institution of constitutional dictatorship.’” Wood, *supra* note 67, at 263. Another reviewer, Hans J. Morgenthau, understood at the time the value of what Rossiter claimed and complimented Rossiter for facing a “burning problem squarely” that others in the discipline “generally shun or . . . treat like a pathological abnormality.” Hans J. Morgenthau, Book Review, 54 AM. J. SOC. 566, 566 (1949).

States required a presidency that possessed power greater in scope and character than the power possessed by prior presidents.

#### LAST WORDS

Looking back, Rossiter's major and overlooked contribution was his contention that the end of World War II and the inauguration of the atomic age meant an increase of federal power, the dominance of the executive branch over the legislative branch, and the loss of democratic values and individual liberties. That argument was overlooked by most reviewers at the time.

In accordance with this general position, Rossiter did not pretend that in the wake of World War II and the emergence of the atomic age that the United States would return to its pre-World War II governing forms. Instead he claimed that fundamental shifts were occurring in the United States and that the federal government would possess more power than ever before. Rossiter further claimed that such power was necessary to meet the challenges the nation faced while acknowledging that the existence of such power threatened the nation's democratic political premises. Second, Rossiter argued that the presidency would emerge as the dominant branch of government, that the new power centralized in that office undermined the assumption that a democratic—as opposed to an authoritarian—political structure required an allocation of power that allowed for an effective system of checks and balances. Third, the assumption of new power at the federal level and the concentration of that power in the presidency were permanent. So in contrast to past periods when a crisis ended and there was a concerted effort to drain the power from government entities that had exercised it during the crisis, there would now be no draining. In short, the old categories of war and peace were too simplistic to fit the new age, or as Rossiter wrote, “[y]ou can't go home again.”<sup>81</sup> For Rossiter, the consolidation of such permanent power constituted a shift in the national paradigm that threatened constitutional democracy and individual liberty, but was necessary for the preservation of the national security.

In retrospect, Rossiter's book has many important shortcomings. I will briefly identify three. First, Rossiter's explanation of the circumstances that would prompt the necessary assumption of dictatorial powers was incomplete. His identification of war, rebellion and economic depression left out, among other considerations, the scramble for energy sources, strategic trading interests, preemptive wars in the name of Weapons of Mass Destruction, and conflicts that may be

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<sup>81</sup> CD, *supra* note 1, at 314.

driven by ideological forces. Second, Rossiter's model of dictatorial power was, not surprisingly, rooted in past experiences, and he did not foresee future developments that enhanced the power of the state and diminished structural checks and balances in the governmental scheme as well as individual liberty and privacy. A few examples illustrate the limitations of this model. One, Rossiter did not foresee the emergence of the surveillance state represented by the National Security Agency or other intelligence agencies, the new power they constituted in the hands of executive officials and the threat they presented to the democratic values and individual liberty. Two, Rossiter did not foresee the enormous expansion—perhaps inconceivable from Rossiter's vantage point—of the national security state that extended well beyond the iconic CIA and NSA. Three, Rossiter did not foresee the expansion of secrecy in the execution of executive branch actions across and ever expanding area of activity, a development that hid from public view and accountability important governmental actions. Four, Rossiter's model of constitutional democracy was incomplete and too simple. Two examples illustrate this point. The emergence of a powerful executive supported by a large number of agencies with extensive influence to make and execute policy often hidden from public view by claims of secrecy, which in turn are premised on national security considerations, put the voting public at a serious disadvantage in knowing what its government does on its behalf and in holding the government accountable. Second, although Rossiter was aware of the German and Italian abuse of the mass media in the 1920s and the 1930s to manufacture democratic consent, he did not integrate into his analysis the power of the state going forward to distort the democratic process by abusing the mass media to create public support for policies premised on incomplete, misleading, and false information.

Rossiter's most troubling weakness was his assumption that the nation's survival required authoritarian rule by an executive that dominated the legislature and the courts and sharply curtailed individual liberty. And although Rossiter stated at one point that no sacrifice was too great for the long term preservation of the democracy, least of all the temporary sacrifice of democracy, Rossiter's underlying analysis suggested that he did not think that the autocratic and repressive new regime he endorsed as necessary was in any meaningful sense temporary or short lived. Thus, although Rossiter tried to dress up his prescription for national security as temporary, his underlying analysis suggested that it was more or less permanent. In other words, Rossiter's prediction as to what *would* occur in the United States had much more merit to it than his claim as to what *should* happen.

The challenge now confronting the United States is not to try to return—to use Rossiter's era as a benchmark—to a pre-World War II



presidency and executive branch. Instead, what is required is the emergence of a new and responsible congressional authority in national security matters that harnesses executive power and the assertion of new forms of judicial authority that impose meaningful accountability on executive power. In short, to paraphrase Rossiter, we may not be able to go home again, but there is no reason why we cannot shape new structures that limit executive power and enhance governmental transparency and accountability.

As much as Rossiter's *Constitutional Dictatorship* opens a fascinating window into the mindset of his times, the values underlying his basic claim that the security of the nation going forward required an executive free of meaningful legislative and judicial oversight and the sacrifice of individual liberty were erroneous and fundamentally misplaced. Indeed, Rossiter seems to have been overwhelmed by national security threats and unwilling to countenance risks required by democracy and liberty, and in reaching this calculation Rossiter seems to have forgotten Louis Brandeis' reminder that the nation's founders who made a revolution were not cowards<sup>82</sup> and Benjamin Franklin's admonition that those who sacrifice essential liberty in the name of temporary security deserve neither.<sup>83</sup>

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<sup>82</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>83</sup> BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 289 (1759) ("Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.").